CITIBANK, N.A.

v.

MOHD. ABDULLAH ANG SWEE KANG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C3-23-3151-86]
26 JULY 1991

CONTRACT: *Guarantee - Joint and several - Affidavit cannot challenge clear terms of guarantee - Current account in KL and Jakarta - Effect of - Interest agreed at 2% above base lending rate - Particulars of interest not clear - Claim for interest not verified - Triable issue - Evidence Act 1950, ss. 2, 91, 92.*

The plaintiff bank had given various credit facilities to MOIC, including a loan facility in 1985 for RM1 million for a project in Indonesia. As security for this loan, the plaintiff required the directors of MOIC to jointly and severally guarantee the loan. The plaintiff expected MOIC to open an account in relation to this facility at its branch in Jakarta; however the current account was with the KL branch of the plaintiff bank. It was agreed that the current account would be operated under the signature of two out of 9 named persons. The loan was repayable in six months and interest was agreed at 2% above the base lending rate.

The first defendant (D1) as managing director of MOIC requested the plaintiff to transfer RM550,000 to an account in the name of one T in the plaintiff's bank in Jakarta. Although the instructions were not signed by two signatories, the plaintiff bank carried out D1's request.

MOIC failed to settle the amount within the said period as a result of which the plaintiff sued the guarantors. The plaintiff's application for an O. 14 judgment against D2 and D3 was refused; D2 was now a bankrupt. This is the plaintiff's appeal against the dismissal of his O. 14 application against D3.

Held:

[1] The affidavit of D3 which contends that the guarantee referred to only the RM1 million overdraft facility, contradicts the clear terms stated in the guarantee and cannot be used to run foul of ss. 91 or 92 of the Evidence Act 1950.

[2] It is clear that what was agreed to between the parties was that the facility would be by way of advance in the current account of MOIC with the plaintiff bank in KL. The reference to the joint account in Jakarta was nothing more than the KL branch of the bank drumming up some business for its branch in Jakarta. The RM1 million credit facility was for MOIC and not for the joint venture. Therefore the contention that the disbursement of the RM1 million should have been through the plaintiff bank at Jakarta was not a triable issue.

[3] As the rate of interest claimed was challenged, the formal verification suggested in the prescribed form in the RHC is insufficient. It is not clear what the base lending rate is and D3 is entitled to have the claim for interest tried.

[Order accordingly.]

Legislation referred to:
Evidence Act 1950, ss. 2, 91, 92.

For the plaintiff - Lim Eng Hoe; M/s. Mah-Kok and Din
For the 2nd defendant - T.T.J. Doshi; M/s. Abdullah and Zainuddin
For the 3rd defendant - Sia Bee Keng; M/s. Nazri Aziz and Wong

JUDGMENT

VC George J:

Malaysia Overseas Investment Corporation Sdn. Bhd. (MOIC), enjoyed various credit facilities with the plaintiff bank. On 19 January 1985 there was a meeting between representatives of MOIC and of the bank that resulted in the bank agreeing to grant MOIC an additional temporary facility by way of a loan of RM1 million as working capital for a project in Indonesia. Apparently the bank had required the joint and several guarantee of the directors of MOIC as security for the loan.

By a letter dated 21 January 1985 MOIC applied for the facility the subject of the said discussion 2 days earlier and enclosed with the letter a form of joint and several guarantee duly executed by the 3 defendants herein and by one Tan Sri Rashdan b. Hj. Baba. By its letter of 23 January 1985 the bank agreed to the application and accepted the security provided by the said letter of guarantee. The facility was referred to as "advances in current account" up to a maximum of RM1 million and was to bear interest at 2% above the bank's base lending rate and there was to be full repayment within 6 months of 30 January 1985. The bank also expected MOIC to open an account in respect of the project at the branch of the bank in Jakarta. But the current account to be used for the facility was with the Kuala Lumpur branch of the bank.

The current account had in fact been opened in or about October 1984 and it was agreed that it be operated under the signature of any two out of the 9 named persons. Shortly after agreement had been arrived at in respect of the RM1 million facility the 1st defendant as managing director of MOIC wrote a letter to the bank under the MOIC letterhead requiring them to transfer RM550,000 to an account in the name of one P.T. Tjiriadharma at Citibank Jakarta. This apparently the bank at Kuala Lumpur did even though the instructions were not covered by the required 2 out of the 9 named signatories.

By a letter dated 6 July 1985 the bank reminded MOIC of the fact that the 6 months for repayment of the temporary loan of RM1 million was about to expire on 31 July 1985 and required MOIC to "liquidate" the outstanding amount by that date. That letter was copied to the 4 guarantors.

No repayment was effected. Hence this suit by the bank against the guarantors on their guarantee.

The guarantee provided that in consideration *inter alia* of the bank making or continuing advances or otherwise giving credit to MOIC the guarantors jointly and severally guarantee payment on demand of such amounts "owing at the time" the guarantee was provided or is "thereafter owing or incurred to the bank from or by (MOIC) on any current or other account or in any manner whatsoever ..." It was provided that the total sum for principal recoverable was limited to RM1 million but in addition interest, legal costs and expenses and other charges owing as at the date of demand was also recoverable from the guarantors.

There was a conclusive evidence clause and the claim of the plaintiff was backed by a certificate from its manager certifying that as at 30 June 1986 MOIC owed the bank RM3,878,980.37 together with interest of RM297,267.44 out of which "RM125,723.04 represents the interest accrued on an overdraft facility of RM1,000,000".

The bank unsuccessfully sought an O. 14 judgment against the 2nd and 3rd defendant guarantors. Since then the 2nd defendant had been made a bankrupt. By encl. (18) the plaintiff appeals against the refusal of the Senior Assistant Registrar to grant summary judgment and this judgment is in respect of the appeal *vis-a-vis* the 3rd defendant.

For the 3rd defendant it was contended that it was the intention of the parties that the guarantee had reference to only the RM1 million overdraft facility. This contention contradicts what is stated in the guarantee. It was attempted to bolster this contention by reference to certain letters. Sections 91 and 92 of the Evidence Act does not permit this unless one of the provisos to s. 92 can be called to aid which was not the case here. Ms. Sia of Counsel for the 3rd defendant referred to s. 2 of the Evidence Act which provides that the Act:

> shall apply to all judicial proceedings in or before any Court, but not to affidavits presented to any Court or officer nor to proceedings before an arbitrator.

Great laxity is no doubt given to what can go into an affidavit. But such an affidavit cannot be used to run foul of what is provided by s. 91 or s. 92 of the Act. What is set out in the guarantee is clear and not ambiguous. The effect of s. 91 and s. 92 is equally clear and unambiguous. The point taken does not provide the 3rd defendant with a triable issue.

The next point taken as providing a triable issue is based on the contention that as to the RM1 million, disbursement of it should have been through a joint account of Citibank Jakarta. The document relied on for this contention was the letter of 23 January 1985 from the bank approving the application for the facility. It seems to me beyond argument that what was agreed to was that the facility would be by way of advance in the current account of MOIC with Citibank Kuala Lumpur. The reference to the joint account at Jakarta was nothing more than the Kuala Lumpur branch of the bank drumming up some business for its branch in Jakarta. The RM1 million credit facility was for MOIC and not for the joint venture. To arrive at this conclusion a trial is not called for.

The 3rd point was that RM550,000 was improperly transferred to an account at Jakarta. The answer to that point *vis-a-vis* the claim of the plaintiff against the guarantors is that even if that RM550,000 and interest accrued therefrom are deducted from the amount owing by MOIC the amount left would be well above the RM1 million guaranteed by the guarantee the subject of the action.

The 4th and last point taken is in respect of the claim for interest. What was agreed between MOIC and the bank was 2% above the base lending rate of the bank. The guarantee guaranteed payment of interest at rates charged by the bank. Further and better particulars of interest charged showed the rate of interest in respect of RM1 million varied from month to month fluctuating from a low 10.85% to a high 17.20%. The rate of interest claimed was challenged and in the face of the challenge the formal verification suggested in the prescribed form in the RHC is insufficient. What the base lending rate is far from clear. The claim for interest has not been duly verified and the 3rd defendant is entitled to have the claim for interest tried.

The appeal is allowed in respect of the claim for the principal amount of RM1 million. There will be interest thereon at the statutory rate of 8% p.a. from the 1st day of July 1986 until realisation. In respect of the claim for the accrued interest and for a rate of interest above 8% p.a. on the judgment sum from 1 July 1986 until realisation there will be unconditional leave to defend.

The appellant is entitled to half the costs of the appeal as taxed.

Also found at [1992] 1 CLJ 116